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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 116

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

v.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962, No. 1077

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

against

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee.

APPELLANTS' REPLY TO MOTION TO AFFIRM

I

In our jurisdictional statement (at pp. 8-13), we have shown that the decision of the Court below (J.S. pp. 23 *et seq.*) is contrary to prior decisions of this Court holding that the power of the States to regulate and control traffic in intoxicating liquors within their borders may not be limited by the Commerce Clause of the United States Constitution. See especially *State Board of Equalization* v. *Young's Market Company*, 299 U. S. 59 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Gordon* v. *Texas*, 355 U. S. 369 (1958); *California* v. *Washington*, 358 U. S. 64 (1958).

We further noted that the District Court, in imposing a subjective test purporting to determine the reasonable-

ness of New York's liquor regulations, disregarded precedents of this Court which have consistently rejected any attempt to have the courts question the reasonableness or necessity of state liquor laws adopted pursuant to the Twenty-first Amendment. See *State Board of Equalization* v. *Young's Market Company*, 299 U. S. 59, 62 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 403-404 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394 (1939); *Finch* v. *McKittrick*, 305 U. S. 395, 398 (1939); see also concurring opinion of Mr. Justice FRANKFURTER in *Carter* v. *Virginia*, 321 U. S. 131, 139 (1944). We may add that even in areas unconcerned with intoxicating liquors, this Court has very recently had occasion to repudiate judicial determinations as to the wisdom and utility of state legislation. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963).

In the light of the clear conflict between the decision below and the consistent line of decisions of this Court sustaining the application of state liquor control laws to traffic in intoxicating liquors despite their effect on interstate or foreign commerce, we find it difficult to conceive how appellee can seriously contend that the questions presented by this appeal are so insubstantial as to warrant summary affirmance. Indeed, the above cited precedents of this Court would well justify a summary *reversal* of the decision below.

II

We also take strong exception to appellee's contention in its motion to affirm that the questions raised by this appeal have been fully briefed, argued and determined when the case was here in 1962. The only issues considered by this Court upon the appeal brought by appellee at that time were whether a single district judge could properly order abstention upon an application to convene a statutory three-judge court, and whether the Court of

Appeals had jurisdiction over an appeal from the order of a district judge denying the convening of a three-judge court. The prior opinion of this Court (370 U. S. 713) in no way passed upon—but left open to judicial consideration—the substantive questions now being raised on this appeal concerning the constitutional power of the State of New York to apply its liquor licensing requirements to appellee's liquor operations.

III

Appellee has failed to offer any authority in its motion to affirm which would support the decision below.

Appellee's reliance on *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, which upheld the constitutionality of the Federal Alcoholic Administration Act, is ill founded. In *Jameson*, the Court declared that the Twenty-first Amendment had not given the states exclusive control over commerce in intoxicating liquors. However, while recognizing the right of Congress to legislate in areas affecting traffic in alcoholic beverages, the Court appears never to have held that federal legislation may be exercised in hostility to and denial of state authority under the Twenty-first Amendment. Indeed, Congress, in the enactment of the Federal Alcoholic Administration Act (27 U.S.C. Ch. 8) sought to insure against possible conflict with state liquor laws by requiring the Secretary of the Treasury to deny the issuance of a federal permit to engage in liquor operations involving interstate and foreign commerce upon finding "That the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted" (27 U.S.C. § 204[a][2][c]).

Nor is appellee's reference to decisions dealing with liquors confined to federal reservations, such as *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518; *Yellow Cab Transit Co.* v. *Johnson*, 321 U. S. 383, and *During* v. *Valente*, 267 App. Div. 383, 46 N.Y.S. 2d 385, applicable

to the case at bar. Each of these decisions was based upon a state legislative surrender of control over articles within territory ceded to the Federal Government. The liquors in the instant case are not on or within federally ceded territory but are stored and sold from appellee's private premises at Idlewild Airport on land which, as the Court below recognized, is fully subject to the jurisdiction of the State of New York. See J. S. p. 25, footnote 4.

Appellee seeks to distinguish the cases cited in our jurisdictional statement by claiming that they involve only domestic commerce. Apparently, appellee has ignored or overlooked our reference to *Gordon* v. *Texas*, 355 U. S. 369 (1958), aff'g 166 Tex. Cr. R. 24, 310 S. W. 2d 328, and to *Wylie* v. *State Board of Equalization*, 21 Fed. Supp. 604 (S. D. Calif., 1937). In *Gordon* v. *Texas*, *supra*, this Court sustained a Texas excise tax on liquors purchased and imported from Mexico and merely passing through Texas en route for consumption in another state, despite the contention that the application of the Texas statute violated the Commerce and Export-Import Clauses.

In *Wylie*, *supra*, an application was made to convene a three-judge district court to enjoin enforcement of a provision of the California Alcoholic Beverage Control Act, requiring an importer's license to bring into the state from Mexico any alcoholic beverages in the quantity of one wine gallon or less for personal use and consumption—although such liquor was exempted by federal statute from payment of Customs duties. The application of the California statute was similarly attacked as violating the federal Commerce and Export-Import Clauses. In dismissing the complaint for want of a substantial federal question, the district court stated (pp. 605-606):

> "[T]he contention that because a citizen may import a certain amount of liquors from the republic of Mexico, free of duty, his constitutional right is vio-

lated if, after the liquor is in his possession, he is required to obtain an importer's license in order to retain it, lacks substance. The Twenty-first Amendment prohibits 'importation' into a state 'in violation of its laws.' The right to import liquor, either with or without the payment of import duties, does not confer the right to possess it within the state (see *License Cases*, 1847, 5 How. 504, 12 L. Ed. 256), any more than the right to transport liquor from state to state confers the privilege of selling it without regulation by a state (*Phillips* v. *Mobile*, 1908, 208 U. S. 472, 28 S. Ct., 370, 52 L. Ed. 578), or under regulations different from those applying to handlers of domestic liquor (*State Board of Equalization* v. *Young's Market Co., supra*). Control of the traffic in liquor by the states has always been considered a proper exercise of their police power. See *Premier-Pabst Sales Company* v. *State Board of Equalization*, D. C. Cal. 1935, 13 F. Supp. 90; *Mugler* v. *Kansas*, 1887, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205. Even before the Twenty-first Amendment, it was held repeatedly that the United States by licensing persons could not confer upon them the right to engage in the sale of liquor in states which prohibited such sale. *License Cases*, 1847, 5 How. 504, 12 L. Ed. 256; *McGuire* v. *Massachusetts*, 1865, 3 Wall. 387, 18 L. Ed. 226; *Pervear* v. *Massachusetts*, 1867, 5 Wall. 475, 18 L. Ed. 608; *United States* v. *Lariviere*, 1883, 108 U. S. 491, 2 S. Ct. 906, 27 L. Ed. 803; *Phillips* v. *Mobile*, 1908, 208 U. S. 472, 28 S. Ct. 370, 52 L. Ed. 578."

Appellee reasserts its contention that its business is "federally sanctioned" despite the fact that it has never been able to point to language in any federal statute or regulation which authorizes it to purchase and import liquors across state lines and to store and sell such liquors (see opinion below, J. S. at p. 26; also Record at 71, 134-

138, 153) in violation of state liquor licensing requirements. As noted in our jurisdictional statement (pp. 16-19), § 311 of the Tariff Act of 1930 (19 U.S.C. § 1311)—dealing with the direct exportation by domestic manufacturers of articles manufactured in Class 6 bonded warehouses—has no applicability to appellee's resale operations conducted in its unbonded private premises in New York. Nor do the provisions of the Internal Revenue Code and federal regulations cited by appellee, at page 14 of its motion to affirm, apply to or sanction appellee's business. Those statutes and regulations are concerned solely with exemption from federal duties and were never intended by Congress to provide immunity from compliance with state liquor control laws. Nor could such immunity from state control be granted by Congress in the light of § 2 of the Twenty-first Amendment. Moreover, the federal statutes and regulations cited by appellee plainly refer to products manufactured in warehouses known in Treasury Regulations as Class 6. Class 6 warehouses are limited by Treasury Regulation to the manufacture and storage of solely *domestic* products. 19 C.F.R. § 19.1(a). Yet, appellee's president testified at trial that at least 60% of the liquors purchased and re-sold by appellee are imports of foreign manufacture (R. 102-103).

The admission at the trial that at least 60% of appellee's trade is in imported liquors makes a hollow mockery of appellee's flag-waving assertion that its profit-making operations are in the federal interest by encouraging a "competitive advantage for the American wine and liquor industry and employment therein". It renders no less misleading appellee's contention that its operations are subject to 26 C.F.R., Part 201 § 201.467, which requires liquors intended for export to be labelled "bottled for export from the U.S.A." As appellee's president also testified at the trial (R. 103-104, 147), that label requirement applies only to *domestic* liquors, the *minor* part of appellee's stock in trade.

The record below clearly discloses that appellee has not obtained any government bond for the conduct of its liquor operations (R. 100) and does not store its liquors in a bonded or customs-bonded warehouse. There is no customs officer assigned to appellee's premises to witness and supervise the entry, storage or removal of liquors (R. 120), or the asserted deliveries of liquors from appellee's premises to planes (R. 126-128). The discrepancies between appellee's operations and the detailed requirements concerning government bonded warehouses set forth in the federal statutes and regulations cited by appellee as "sanctioning" its business, serve to highlight the dangers involved in permitting this type of operation to continue free of state control.

IV

In our jurisdictional statement we expressed concern that the decision below, declaring appellee's liquor operations to be exempt from compliance with New York's liquor control laws, threatened to invite a flood of similar un-licensed liquor operations throughout the State. What was set forth as a prediction has already become a dangerous reality. Since the printing of our jurisdictional statement, a concern called Ammex Warehouse Company, Inc., on May 20, 1963 opened a store at 2201 Whirlpool Street in Niagara Falls, New York* selling "Duty-FREE" liquors at "BELOW COST!" bargain prices (although this company had never applied for, or obtained, a license for any part of its operations from the New York State Liquor Authority). This same company has also announced plans to open additional stores for the sale of alcoholic beverages at 5 Niagara Street in Niagara Falls, and at 173 Porter Avenue in Buffalo, New York.** In

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*As advertised in the Buffalo Courier-Express, May 19, 1963 (see copy hereto annexed as Appendix "A"), and as reported in the Niagara Falls Gazette, May 18, 1963.

** Niagara Falls Gazette, May 18, 1963.

addition, the sales receipt of this company (a copy of which is attached to this brief as Appendix "B") represents that this company operates "TAX & DUTY FREE STORES" at Idlewild Airport, Champlain, Ogdensburg, and Watertown in the State of New York, and at locations in Arizona, California, Maine, Michigan, Texas, the State of Washington, and Washington, D. C.

We have also been informed by Attorneys General and Liquor Control Boards of sister states that businesses involving the sale of "duty-free" liquors to prospective foreign-bound travelers have already been instituted in California, Michigan and Texas, free of state liquor licenses, upon the theory sought to be invoked by appellee in the instant case—namely, that the Tariff Act exemptions from federal customs duties preclude the application of state liquor control laws to their traffic in intoxicating liquors. This runs clearly counter to the lower court's suggestion that its decision would have no widespread repercussions (see J. S. at p. 34).

It is, therefore, apparent that the decision below, unless reversed by this Court, will continue to stimulate the growth of similar un-licensed and un-regulated liquor businesses throughout the nation in open defiance of state liquor control laws and contrary to the clearly expressed mandate of the Twenty-first Amendment.

CONCLUSION

This Court should deny appellee's motion to affirm, and should note probable jurisdiction of this appeal or, in the alternative, reverse the judgment below.

Dated: New York, N. Y.
June 10, 1963

Respectfully submitted,

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APPENDIX A

Advertisement in Buffalo Courier-Express, Sunday, May 19, 1963, p. 6c.

(See opposite ☞)

Now You May Buy

LIQUOR and CIGARETTES BELOW COST!

For Example: (Prices Subject to Change Without Notice)

SCOTCH 86.6 pf.		
• Haig & Haig (Pinch Bottle)		$5.50 ea.
• Johnny Walker (Black)	$6.25 ea.	5.50 ea.
• Haig & Haig 5-Star	4 50 ea.	3.50 ea.
• Dewar's White Label	4.50 ea.	3.00 ea.
• White Horse	4.50 ea.	3.50 ea.
• Johnny Walker (Red)	4.25 ea.	3.50 ea.
• Ballantines		3.00 ea.
• Ambassador Deluxe	3.75	2.50 ea.
CANADIAN BLENDED WHISKEY 86.6 pf.		
• Seagram's V.O. (6 years old)		3.50 ea.
• Schenley OFC (8 years old)	3 00 ea.	2.00 ea.
• Canadian Club (6 years old)	3 75 ea.	2.50 ea.
BOURBONS 86.6 pf.		
• Walker's Deluxe	3.75 ea.	2.50 ea.
• Ancient Age	3.75 ea.	2.50 ea.
• I. W. Harper (86)	5.00 ea.	3.50 ea.
MISCELLANEOUS		
• Remy Martin V. S. O. P.		6.00 ea.
• Schenley Reserve	3 00 ea.	2.00 ea.
• Walker's London Dry Gin	2.25 ea.	1.50 ea.

AMERICAN CIGARETTES

• Regular Size–1.65 ctn. • King Size & Filter–1.75 ctn.

GENERAL INFORMATION

Now, for the first time the United States of America has Free Port Stores (U. S. Customs Bonded Warehouses). Travelers and vacationers leaving the United States of America for Canada can afford themselves the opportunity to buy tax and duty free cigarettes and liquors at tremendous savings.

*NOTE: THIS LIQUOR IS FOR EXPORT, USE AND CONSUMPTION OUTSIDE THE UNITED STATES & CANNOT UNDER ANY CONDITIONS BE ENTER THE UNITED STATES.

WHO MAY BUY

Anyone going into Canada under the following conditions:

An American can buy and take with him, in accordance with current Canadian Customs regulations, up to one 40 oz. bottle of liquor and one carton of cigarettes as a part of his baggage allowance free of all Canadian Taxes and Duties, each time he visits Canada as a tourist.

A Canadian is allowed the same quantities as an American, but is only permitted to do this once every four months after an absence from Canada for a period of at least 48 hours on a visit to the United States.

All liquors and cigarettes purchased thru this Tax and Duty FREE store are sold "In Bond" in accordance with paragraph 1798, U.S. Tariff Act

AMMEX CUSTOM BONDED WAREHOUSE

Our Only Location

2201 WHIRLPOOL ST., NIAGARA FALLS, N. Y.

APPENDIX B

Customer's Copy of Sales Receipt of Ammex Warehouse Company, Inc.

(See opposite ☞)

CUSTOMER'S COPY

TAX & DUTY FREE STORES

operated by

Ammex Warehouse Company, Inc.

Arizona	PORT HURON	*Texas*
NOGALES	SAULTE SAINT MARIE	BROWNSVILLE
California	*New York*	EAGLE PASS
CALEXICO	BUFFALO	EL PASO
SAN YSIDRO	CHAMPLAIN	HIDALGO
Maine	IDLEWILD INTL. AIRPORT	LAREDO
CALAIS	NIAGARA FALLS	*Washington*
Michigan	OGDENSBURG	BLAINE
DETROIT	WATERTOWN	*Washington D. C.*
		DULLES INTL. AIRPORT

Warehouse Entry No. 13-17 Date June 5 1963

Name [illegible]

CLERK'S INITIALS	Only for EXPORT, USE and CONSUMPTION outside the continental limits of the United States of America.	DELIVERY TIME
		12:20

QUAN.	DESCRIPTION	PRICE	AMOUNT	
1	2 Bottles Teb	2.50		
	THIS COPY MUST BE GIVEN TO U.S. OFFICER AT DESTINATION.	TOTAL		

Total packages No. 1

C. H. License No. 1

Delivered to cartman in good condition unless otherwise noted.

Hr. 1 1 3
(Date) (Warehouse Officer)

Signature [signature]
Cartman

The within described merchandise arrived at this port and cleared for destination seals intact.

Received from cartman in apparent good condition unless otherwise noted.

Hr. _____
(Date) (Inspector)

Signature _____
Purchaser

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U. S. CUSTOMS BONDED WAREHOUSE

Rec'd By _____